

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

IN RE:

**JANET SPINOSA MASTOWSKI d/b/a
SWISS CHALET MOTEL,**

Debtor.

BK. NO. 91-21928

AP NO. 91-2180

CHAPTER 7

JAMES RANDALL,

Plaintiff,

-vs-

JANET SPINOSA MASTOWSKI,

Defendant.

DECISION AND ORDER

BACKGROUND

On July 8, 1991 the debtor, Janet Spinosa Mastowski (the "Debtor"), filed a petition initiating a Chapter 7 case. On her Schedules the Debtor listed secured claims of \$59,568.16, the amount due under a land contract on her residence located at 34 Geneva Street, Bath, New York and valued at \$66,000, and unsecured claims totaling \$23,471.11. Included on the Schedule of Unsecured Claims is a \$10,000 loan due to the Debtor's brother, Salvatore Spinosa, and \$8,000 due to James L. Randall ("Randall"). Randall is the owner of the Swiss Chalet Motel in Bath, New York (the "Motel") which he had leased to the Debtor. On her Schedules, the Debtor listed various categories of personal property with a total value of \$1,775, including \$300 in cash. All of the scheduled personal property was claimed as exempt.

By filing a complaint on October 21, 1991, which set forth nine separate claims for relief, Randall commenced an adversary proceeding against the Debtor: (a) objecting to the discharge of the Debtor pursuant to Sections 727(a)(2), (3) and (4); (b) seeking a judgment against the Debtor for \$7,372.00, the estimated value of certain items of property alleged by Randall to have been taken and converted by the Debtor when she was evicted from the Motel and rents improperly collected, retained and converted by

the Debtor; (c) seeking a judgment against the Debtor in the amount of \$2,655.00, the estimated value of damage alleged by Randall to have been done by the Debtor to the Motel; and (d) seeking a determination pursuant to Section 523(a)(6) that the requested judgments for conversion and damage be determined to be nondischargeable.

In her answer, the Debtor denied the material allegations of the complaint. Thereafter, a pretrial conference was held before now retired Judge Edward D. Hayes on December 20, 1991. After extensive discovery was completed by Randall, this matter was set down for trial on May 14, 1992.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff's First and Second Claims for Relief - **§ 727(a)(2) and § 727(a)(4)(A)**

Randall's First Claim for Relief alleges that the Debtor's discharge should be denied under Section 727(a)(2) because she concealed certain property, namely monies, with the intent to hinder, delay or defraud a creditor or her trustee. The Second Claim for Relief alleges that the Debtor should be denied her discharge because she knowingly and fraudulently made a false oath when she listed \$300 as "cash on hand" in her Schedules and failed to state the receipt or disposition of all rentals received.

The Debtor's Schedules indicate cash on hand of \$300. At trial, her Section 341 meetings and the plaintiff's depositions of the Debtor on March 17 and March 27, 1992, the Debtor insisted that the Motel rents she collected after June 15, 1991 were used to pay utility bills for the Motel, her attorneys and other living expenses, such as food and clothing. However, at trial the proof was clear that no utility bills were in fact paid. Further, the Debtor has consistently been unable to supply any detailed information with respect to the claimed expenditures for living expenses despite numerous opportunities to do so. The Court believes that this inability to do so is but one more circumstance of the Debtor's pattern of concealment and lack of honesty and straightforwardness with the Court and the bankruptcy system in

connection with her assets. From observing the Debtor at a pretrial conference and at the trial, reviewing the tape of the Debtor's § 341 meetings (the "First Meeting Tape") and the transcripts of the depositions of the Debtor conducted on March 17, 1982 and March 27, 1992 (the "Deposition Transcripts") the Court finds that her testimony - that by July 8, 1991 she had expended all of the Motel rents which she collected from June 15, 1991 through July 5, 1991 on utility bills for the Motel, attorney's fees and other living expenses but is unable to supply the details with respect to these expenditures - is simply not credible. In fact, after observing the Debtor the Court believes that the Debtor, although she probably has had a very difficult life, would, if she chose to, be able to account for every penny she received and expended during the period in question. Further, the Court does not believe that the Debtor would have expended that amount of cash on food and clothing in such a short period of time.

One of the most important policies of the Bankruptcy Code is to give honest debtors a fresh start. In this case, the Court concludes that the Debtor has been less than honest with the Court and bankruptcy system with respect to accounting for the Motel rents received within the month of the filing of her petition and in fact that she has concealed property of the estate after the date of the filing of her petition with an intent to hinder, delay or defraud Randall and her trustee.

Plaintiff's Third and Fourth Claims for Relief -
§ 727(a)(2) and § 727(a)(4)(A)

In Randall's Third Claim for Relief he alleged that the Debtor is the owner of an antique organ and certain rare coins which she failed to list on her Schedules. After hearing all of the testimony at the trial, the Court concludes that Randall has failed to meet his burden to prove that the Debtor was the owner of such items.

In Randall's Fourth Claim for Relief he alleged that the Debtor made a false oath when she failed to list the organ and coins. Since the Court finds there is insufficient evidence to find that she was the owner of such items, the request for relief under the Fourth Claim for Relief must be denied.

Plaintiff's Fifth Claim for Relief - § 727(a)(3)

In Randall's Fifth Claim for Relief he alleged that the Debtor has concealed, destroyed or failed to preserve books and records from which her financial condition or business transactions might be ascertained and that the Debtor's discharge should be denied pursuant to Section 727(a)(3). After reviewing the pleadings, the Deposition Transcripts, the First Meeting Tape and the Notices to Produce served upon the Debtor, the Court concludes that the Debtor has in fact concealed and failed to preserve recorded information from which her financial condition might be more fully ascertained, and there is no justification for this conduct. In this case, the Debtor has shown a consistent pattern of failing to supply business records and documentation; always promising that she could supply them, just not at the particular time they were asked for; and in fact never supplying them. This pattern of conduct by the Debtor is not the conduct of an honest debtor to which the Bankruptcy Code affords a discharge. The Debtor's discharge is denied pursuant to Section 727(a)(3).

**Plaintiff's Sixth, Seventh and Eighth (In Part) Claims
for Relief - § 523(a)(6) and § 727(a)(4)(A)**

After reviewing the pleadings, hearing the witnesses at trial, reviewing the Deposition Transcripts and the First Meeting Tape, the Court concludes that Randall has failed to meet his burden to prove that the Debtor removed from the Motel or took from Randall the personal property items detailed in Randall's Sixth Claim for Relief and listed on Plaintiff's Trial Exhibit 23. From the evidence presented

at trial, it is clear that Randall and his representatives had joint access to the basement of the Motel throughout the term of the Debtor's lease, as clearly provided for in the August 1, 1989 lease of the Motel. From the testimony at trial it also appears that a number of items of personal property were occasionally shifted among the various motels owned by Randall. Although the Debtor's testimony at trial was not credible on a number of issues, the Court finds her testimony, that she did not remove personal property of the Motel at the time she ceased being in possession of the Motel, to be credible. Therefore, Randall's Seventh Claim that the Debtor made a false oath by not listing this alleged converted property is also denied.

Plaintiff's Eighth Claim for Relief - § 523(a)(6)

In the balance of his Eighth Claim for Relief, Randall alleged that the Debtor converted certain Motel rents for her own use and that a judgment for this amount should be entered against her and held to be nondischargeable under Section 523(a)(6).

The Debtor was in attendance at Bath, New York Town Court on June 12, 1991 when the Honorable Leon F. Taggart granted Randall a judgment in connection with the Debtor's defaults under her lease of the Motel and determined that she must vacate the Motel premises on or before July 1, 1991. As admitted in the Debtor's answer to the complaint, on or about June 27, 1992 the Debtor received a copy of a June 19, 1991 warrant of eviction signed by the Honorable Leon F. Taggart confirming that Randall was to be in full possession of the Motel on or before July 1, 1991. Between approximately June 15, 1991 and July 5, 1991 when the Debtor vacated the Motel, she collected Motel rents of at least \$2,375 (Pls. Trial Exhibits 25-32). These rents were collected after the summary proceedings held in Bath Justice Court on June 12, 1991 when the Debtor became aware that Randall and the Court anticipated that she would not be in possession or control of the Motel after June 30, 1991. The *pro rata* Motel rent

collected by the Debtor for periods after June 30, 1991 was \$2,111.96. This amount was never segregated by the Debtor nor turned over to Randall.

The \$2,111.96 of *pro rata* Motel rent for periods after June 30, 1991 were rents which should have been segregated by the Debtor and turned over to Randall. The Debtor's knowing, willful and malicious retention of these rents and her failure to turn them over to Randall constitutes an unlawful conversion of Randall's property by the Debtor.

Section 523(a)(6) excepts from discharge any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity." Although Section 523(a)(6) does not specifically mention a debt arising from conversion, the legislative history indicates that the "willful and malicious injury" language of that section includes a willful and malicious conversion. In re Brubaker, 57 B.R. 736, 738 (Bankr. W.D.Va. 1986); 3 Collier on Bankruptcy, ¶ 523.16[3] at 523-127 (15th Ed. 1992).

A finding of conversion requires that the debtor be found to have "wrongfully assumed dominion over personal property to the exclusion of possession and control by the owner, and in repudiation of the owner's rights." In re Egan, 52 B.R. 501, 506 (Bankr. D.Minn. 1985). See In re Hazelwood, 43 B.R. 208, 213 (Bankr. E.D.Va. 1984). Since a willful and malicious injury does not follow from every act of conversion because "there may be a conversion which is innocent or technical, an authorized assumption of dominion without willfulness or malice," both willful and malicious elements must be shown. Brubaker, 57 B.R. at 739 (quoting Davis v. Aetna Acceptance Co., 293 U.S. 328, 332 (1934)).

The term "willful" as used in Section 523(a)(6) has been held to mean deliberate or intentional. Hazelwood, 43 B.R. at 213; Brubaker, 57 B.R. at 739. The Bankruptcy Code expressly overruled the decision of Tinker v. Colwell, 193 U.S. 473 (1904), which construed willful injury to include the lesser standard of "reckless disregard." Brubaker, 57 B.R. at 739. "Further, for conversion to be 'malicious,' it need not be motivated by hatred, ill will or spite but is sufficient if conversion results from 'a wrongful act done intentionally and without justification or excuse.'" Hazelwood, 43 B.R. at 213-14.

In this case, the Debtor, after she knew she would not be in possession of the Motel after June 30, 1991, collected rents which clearly belonged to Randall. This Court finds that the Debtor deliberately and intentionally collected the rents from the tenants without any jurisdiction or excuse, failed to segregate or turn them over to Randall and thereby willfully and maliciously converted Randall's property to her own. Thus the \$2,111.96 of *pro rata* Motel rent is nondischargeable under 11 U.S.C. § 523(a)(6).

Plaintiff's Ninth Claim for Relief - § 523(a)(6)

After reviewing the Polaroid photographs taken of the Motel on July 6, 1992 (Pls. Trial Exhibits 4-21) and hearing the testimony of the various witnesses at the trial, including the Debtor, Randall and the other witnesses who testified on Randall's behalf, the Court concludes that the Debtor did not, as alleged in Randall's Ninth Claim for Relief, willfully and maliciously damage and injure the Motel when vacating the premises. Although the Motel was clearly left in a state of disarray, it appears that the Debtor was in the process of making repairs and renovations at the Motel prior to her eviction, which on July 6, 1991 were in various stages of completion. Although the photographs (Pls. Trial Exhibits 4-21) appear to show some damage in the nature of holes in the wall, no evidence was provided as to the condition of the Motel prior to the June 1991 eviction proceedings or that the Debtor willfully or maliciously caused any of the damage. Again, although the Debtor's testimony at the trial was not credible on a number of issues, her testimony that there was no damage done by her to the Motel, willful, malicious or otherwise, was credible.

The relief requested by Randall in his Claims for Relief numbered First, Second, Fifth, and as to *pro rata* rents for the month of July Eighth, are granted.

The relief requested by Randall in his Claims for Relief numbered Third, Fourth, Sixth, Seventh, Ninth, and as to alleged missing property Eighth, are denied.

